

Message Text

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ACTION EA-10

INFO OCT-01 ISO-00 SP-02 AID-05 EB-04 NSC-05 RSC-01

CIEP-01 TRSE-00 SS-15 STR-01 OMB-01 CEA-01 L-01 H-01

CIAE-00 COME-00 FRB-01 INR-05 NSAE-00 XMB-02 OPIC-03

LAB-01 SIL-01 PA-01 PRS-01 USIA-06 SEC-01 FEA-01

INT-05 COA-01 IO-04 CEQ-01 EPA-01 AEC-05 DODE-00

FPC-01 PM-03 SAM-01 OES-02 /096 W

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FM AMEMBASSY MANILA

TO SECSTATE WASHDC 7923

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C O R R E C T E D C O P Y -- PARA II SUBPARA J --

E.O. 11652: NA

TAGS: EINV, RP

SUBJECT: PROPOSED PHILIPPINE REGULATIONS FOR FOREIGN INVESTMENT
IN NATURAL RESOURCE EXPLOITATION

1. THIS MESSAGE TRANSMITS TEXT OF PROPOSED NEW GUIDELINES TO
GOVERN FOREIGN INVESTMENT IN EXPLOITATION OF PHILIPPINE
NATURAL RESOURCES. STATUS THIS INSTRUCTION NOT CLEAR, BUT
IT IS BEING TRANSMITTED IN ANTICIPATION POSSIBLE QUERIES
TO DEPARTMENT. EMBASSY COMMENTS SEPTTEL.

2. TEXT OF GUIDELINES: QUOTE:

PROPOSED OPERATING GUIDELINES TO IMPLEMENT THE INTENT AND
SPIRIT OF THE PRESIDENTIAL DIRECTIVE OF JUNE 14, 1974 ON
FOREIGN INVESTMENTS IN NATURAL RESOURCES

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I. STATEMENT OF POLICY

1) IT IS HEREBY DECLARED TO BE THE POLICY OF THE STATE THAT FOREIGN INVESTMENTS IN ANY FIRM, PARTNERSHIP, CORPORATION OR OTHER FORM OF BUSINESS ORGANIZATION ENGAGED IN THE EXPLOITATION OR DEVELOPMENT OF NATURAL RESOURCES SHALL NOT EXCEED THIRTY PERCENT (30 0/0) OF THE FIRM'S ENTIRE CAPITALIZATION OR OUTSTANDING CAPITAL STOCK, IN THE CASE OF A CORPORATION.

2) IT IS FURTHER DECLARED TO BE THE POLICY OF THE STATE THAT IF THE FOREIGN INVESTOR FURNISHES OR OBTAINS ALL OR THE BULK OF THE FOREIGN FINANCING FOR THE WHOLE PROJECT, THE JOINT VENTURE FIRM CAN ONLY COMMIT A MAXIMUM OF 50 PERCENT OF THE PRODUCTION VALUED AT WORLD MARKET PRICES TO REPAY THE FOREIGN LOAN OBLIGATIONS.

3) IT FURTHERMORE DECLARED TO BE THE POLICY THAT WHEN THE FOREIGN INVESTOR OR LENDER IS AT THE SAME TIME THE SUPPLIER OR AN AFFILIATE OF THE SUPPLIER OF THE MAIN MACHINERY AND EQUIPMENT USED FOR PRODUCTION, HE MUST GUARANTEE THE PURCHASE OF THE ENTIRE OUTPUT AT WORLD MARKET PRICES.

II. DEFINITION OF TERMS

A) "NATURAL RESOURCES" SHALL MEAN ALL LANDS, WATERS, MINERALS, COAL, PETROLEUM, FORCES OF POTENTIAL ENERGY, FISHERIES, WILDLIFE AND OTHER RESOURCES WHICH BELONG TO OR FORM PART OF THE PUBLIC DOMAIN, THE DEVELOPMENT OR EXPLOITATION OF WHICH REQUIRE A PERMIT, PATENT, LICENSE, CONCESSION AND/OR LEASE FROM THE DEPARTMENT OF NATURAL RESOURCES.

B) "EXPLOITATION OR DEVELOPMENT" SHALL BE INTERPRETED TO MEAN BUT NOT LIMITED TO THE EXTRACTION, CUTTING, CATCHING, COLLECTION, HARNESSING, AND GATHERING AND/OR LEASING OF NATURAL RESOURCES.

C) "LICENSE OR CONCESSION" SHALL REFER TO ANY LICENSE, PERMIT, LEASE AGREEMENT, CONCESSION, OR ANY GRANT OF AUTHORITY TO EXPLOIT, DEVELOP AND UTILIZE THE MINERAL, AQUATIC, FOREST AND LAND RESOURCES OF THE PUBLIC DOMAIN GRANTED OR ISSUED BY THE DEPARTMENT OF NATURAL RESOURCES THROUGH THE BUREAU OF MINES, BUREAU OF LIMITED OFFICIAL USE

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FORESTRY DEVELOPMENT, BUREAU OF LANDS AND
BUREAU OF FISHERIES AND AQUATIC RESOURCES.

D) "FOREIGN INVESTMENTS" MEANS EQUITY INVESTMENT OWNED BY A NON-PHILIPPINE NATIONAL MADE IN THE FORM OF FOREIGN EXCHANGE OR OTHER ASSETS ACTUALLY TRANSFERRED TO THE PHILIPPINES AND REGISTERED WITH THE CENTRAL BANK WHICH SHALL ASSESS AND APPRAISE THE VALUE OF SUCH ASSETS. THESE NON-CASH ASSETS MAY BE IN THE FORM

OF CAPITAL GOODS, PATENTS, FORMULAS OR OTHER TECHNOLOGICAL RIGHTS OR PROCESSES.

E) "WORLD MARKET PRICES" SHALL REFER TO PREVAILING PRICES FOR THE COMMODITIES INVOLVED IN THE COUNTRY OF EXPORT DESTINATION AS DETERMINED BY CENTRAL BANK IN ACCORDANCE WITH ITS REGULATIONS GOVERNING EXPORTS.

F) "EXPLORATION" SHALL REFER TO EXPLORATORY ACTIVITIES UNDER SERVICE CONTRACTS DULY APPROVED PURSUANT TO PD 87; SEISMIC SURVEYS UNDER THE PETROLEUM ACT OF 1949 OR EXPLORATION CONTRACTS UNDER PD 151, WHICH ARE NOT INTEGRATED WITH ANY ACTIVE EXPLOITATION OR DEVELOPMENT WORKS CONDUCTED BY THE SAME CORPORATION.

G) "EXISTING ENTERPRISES" FOR PURPOSES OF THIS PRESIDENTIAL DIRECTIVE, SHALL INCLUDE THOSE ENTERPRISES ISSUED LICENSES OR CONCESSIONS BEFORE JUNE 14, 1974.

H) "EXPANSION" SHALL REFER TO ANY EXPANSION OF PRODUCTION FACILITIES THE CONSEQUENCE OF WHICH IS INCREASE IN PRODUCTION CAPACITY.

I) "MAIN PRODUCTION EQUIPMENT" SHALL REFER TO THE PRINCIPAL EQUIPMENT THAT IS DIRECTLY AND ACTUALLY USED IN THE PRODUCTION, MANUFACTURE OR PROCESSING OF THE FINISHED PRODUCT FOR EXPORT BUT SHALL EXCLUDE TRANSPORT EQUIPMENT, MAINTENANCE OR SHOP EQUIPMENT, AND CIVIL WORKS APPURTENANCES.

J) "PHILIPPINE NATIONAL" FOR PURPOSES OF THIS DIRECTIVE SHALL REFER TO A CITIZEN OF THE PHILIPPINES; OR A PARTNERSHIP OR ASSOCIATION WHOLLY OWNED BY CITIZENS OF THE PHILIPPINES; OR A CORPORATION ORGANIZED UNDER THE LAWS OF THE PHILIPPINES OF WHICH AT LEAST SEVENTY PERCENT (70 0/0) OF THE CAPITAL STOCK OUTLIMITED OFFICIAL USE

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STANDING, VOTING AND NON-VOTING, IS OWNED AND HELD BY CITIZENS OF THE PHILIPPINES; OR A TRUSTEE OF FUNDS FOR PENSION OR OTHER EMPLOYEE RETIREMENT OR SEPARATION BENEFITS, WHERE THE TRUSTEE IS A PHILIPPINE NATIONAL AND AT LEAST SEVENTY PERCENT (70 0/0) OF THE FUND WILL ACCRUE TO THE BENEFIT OF PHILIPPINE NATIONALS; PROVIDED, THAT WHERE A CORPORATION AND ITS NON-FILIPINO STOCKHOLDERS OWN STOCK IN THE SAME ENTERPRISE, AT LEAST SEVENTY PERCENT (70 0/0) OF THE CAPITAL STOCK OUTSTANDING, VOTING AND NON-VOTING, OF BOTH CORPORATIONS MUST BE OWNED AND HELD BY THE CITIZENS OF THE PHILIPPINES AND AT LEAST SEVENTY PERCENT (70 0/0) OF THE MEMBERS OF THE BOARD OF DIRECTORS OF BOTH CORPORATIONS MUST BE CITIZENS OF THE PHILIPPINES IN ORDER THAT THAT THE CORPORATIONS SHALL BE CONSIDERED A PHILIPPINE NATIONAL.

III. SCOPE OF APPLICATION

THE POLICIES HEREIN ENUNCIATED SHALL APPLY TO: (A) ANY FIRM APPLYING FOR A LICENSE OR CONCESSION FOR THE FIRST TIME, OR FOR THE RENEWAL OR EXTENSION OF AN EXISTING LICENSE OR CONCESSION OR FOR NEW OR ADDITIONAL FOREIGN INVESTMENTS OR LOANS TO FINANCE NEW OR EXPANSION CAPACITIES, PROVIDED THAT, EXISTING HOLDERS OF LICENSES OR CONCESSIONS WHO ARE MERELY ENGAGED IN EXPLORATION WITHOUT BEING ACTUALLY ENGAGED IN EXPLOITATION OR DEVELOPMENT OPERATIONS SHALL NOT BE COVERED; PROVIDED, HOWEVER, THAT SUCH EXISTING LICENSES OR CONCESSIONS SHALL BE DEEMED VOID AND INOPERATIVE UNLESS WITHIN ONE (1) YEAR FROM THIS PRESIDENTIAL DIRECTIVE, THE HOLDERS THEREOF WILL SUBSTANTIALLY ENGAGE IN EXPLOITATION OF DEVELOPMENT WITHOUT NEED OF NEW OR ADDITIONAL FOREIGN INVESTMENTS.

IV. BASIC GUIDELINES

1) UNDER POLICY STATEMENT NO. 1

AN EXISTING ENTERPRISE HOLDING A VALID LICENSE OR CONCESSION WITH MORE THAN THIRTY PERCENT (30 0/0) FOREIGN EQUITY PARTICIPATION SHALL WITHIN FIVE (5) YEARS FROM THE EFFECTIVITY OF THESE GUIDELINES REDUCE THE FOREIGN EQUITY IN EXCESS OF SAID PERCENTAGE EITHER THRU A PUBLIC OFFERING OR BY LISTING ITS SHARES IN THE STOCK EXCHANGE UNLESS THE LICENSE OR CONCESSION IS VALID FOR A SHORTER PERIOD IN WHICH CASE IT MUST BECOME LIMITED OFFICIAL USE

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AT LEAST 70 0/0 FILIPINO IN OWNERSHIP AND CONTROL AS OF THE DATE OF RENEWAL OR EXTENSION.

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2) UNDER POLICY STATEMENT NO. 2

IF THE FOREIGN INVESTOR DIRECTLY FURNISHES OR OBTAINS THRU AN AFFILIATE BANK OR COMPANY AT LEAST TWO-THIRDS OF THE FOREIGN FINANCING OF THE ENTIRE PROJECT, 50 0/0 OF THE PRODUCTION MAY BE COMMITTED TO AMORTIZE THE LOAN BUT WITHOUT ANY FIXED TRANSFER PROCE WHICH PRICE SHALL BE DETERMINED ACCORDING TO THE PREVAILING WORLD MARKET PRICE OF THE PRODUCT AS DETERMINED BY THE CENTRAL BANK; PROVIDED, THAT INTERNATIONALLY ACCEPTED BUSINESS PRACTICES OR MARKET STRATEGIES MAY BE ALLOWED ON A GOVERNMENT TO GOVERNMENT BASIS: PROVIDED, FURTHER, THAT NOTHING HEREIN SHALL PRECLUDE THE SALE OF THE REST OF THE PRODUCTION TO ANY BUYER INCLUDING THE FOREIGN INVESTOR OR LENDER ITSELF AT WORLD MARKET PRICES.

3) UNDER POLICY STATEMENT NO. 3

IF THE FOREIGN INVESTOR OR AN AFFILIATE THEREOF DIRECTLY SUPPLIES THE MAIN PRODUCTION EQUIPMENT OR DIRECTLY FINANCES OR LIMITED OFFICIAL USE

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OBTAINS FINANCING THEREOF, HE MUST GUARANTY NOT ONLY THE PRODUCTION CAPACITY OF THE SAID EQUIPMENT BUT ALSO THAT ACTUAL PRODUCTION IS PURCHASED AT WORLD MARKET PRICES, PROVIDED, THAT THE MARKET GUARANTY SHALL BE COTERMINUS WITH THE LOAN AMORTIZATION PERIOD: PROVIDED FURTHER, THAT IF THE PURCHASE OF THE EQUIPMENT IS ON CASH BASIS, THE MARKET GUARANTY SHALL BE FOR A PERIOD OF NOT LESS THAN FIVE (5) YEARS FROM START OF COMMERCIAL OPERATIONS.

V. IMPLEMENTING AGENCIES

1) DEPARTMENT OF NATURAL RESOURCES

THE DEPARTMENT OF NATURAL RESOURCES THRU ANY OF ITS LICENSING OFFICES SHALL NOT ISSUE ANY NEW LICENSE OR CONCESSION OR RENEW OR

EXTEND AN EXISTING LICENSE CONCESSION WITHOUT A CERTIFICATION FROM THE SECURITIES AND EXCHANGE COMMISSION THAT THE FIRM HAS TAKEN STEPS TO ENSURE THAT AT LEAST 70 PCT OF CAPITAL STOCK OF A FIRM WHOSE PRINCIPAL OR SECONDARY PURPOSE IS TO ENGAGE IN THE EXPLOITATION OF NATURAL RESOURCES, WILL ALWAYS BE HELD AND CONTROLLED BY PHILIPPINE NATIONALS.

2) SECURITIES AND EXCHANGE COMMISSION

THE SECURITIES AND EXCHANGE COMMISSION SHALL NOT REGISTER AND APPROVE THE ARTICLES OF ASSOCIATION, PARTNERSHIP OR CORPORATION OR ANY AMENDMENT THEREOF, WHERE A PRINCIPAL OR SECONDARY PURPOSE IS TO ENGAGE IN THE EXPLOITATION OF NATURAL RESOURCES WITHOUT A PROVISION THAT AT LEAST 70 PCT OF THE FIRMS CAPITAL STOCK WILL ALWAYS BE HELD AND CONTROLLED BY PHILIPPINE NATIONALS.

3) BOARD OF INVESTMENTS

THE BOI SHALL NOT ISSUE ANY PRIOR AUTHORITY TO DO BUSINESS UNDER SEC. 4 OF R.A. 5455 TO FIRMS PROPOSING TO ENGAGE IN THE EXPLOITATION OF NATURAL RESOURCES UNLESS THE FOREIGN EQUITY PARTICIPATION THEREIN IS LIMITED TO 30 PCT: NEITHER SHALL THE BOARD ALLOW PERMISSIBLE FOREIGN INVESTMENTS UNDER SEC. 3 OF THE SAME ACT THAT WOULD EXCEED 30 PCT. FOR PURPOSES OF INCENTIVES UNDER R.A. 5186 AND R.A. 6135, THE BOARD SHALL NOT GRANT REGISTRATION FOR ANY NEW OR EXPANSION PROJECT INTEGRATED WITH THE EXPLOITATION OF NATURAL RESOURCES, UNLESS THE FOREIGN EQUITY PARTICIPATION IS LIMITED TO 30 PCT.

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TICIPATION IS LIMITED TO 30 PCT.

THE BOARD SHALL NOT APPROVE AND/OR REGISTER ANY LICENSING OR TECHNICAL ASSISTANCE AGREEMENT FOR A PROJECT INVOLVING EXPLOITATION OF NATURAL RESOURCES, UNLESS IT CONFORMS WITH THE POLICY STATEMENTS UNDER THIS DIRECTIVE.

4) CENTRAL BANK OF THE PHILIPPINES

NO NEW FOREIGN LOANS SHALL BE APPROVED BY THE CENTRAL BANK FOR ENTERPRISES ENGAGED IN THE EXPLOITATION OF NATURAL RESOURCES WITHOUT A CERTIFICATION FROM THE SEC AS REQUIRED IN RULE V PAR. 1 ABOVE.

NO LICENSING OR TECHNICAL ASSISTANCE AGREEMENT SHALL BE APPROVED AND/OR REGISTERED FOR PURPOSES OF FOREIGN EXCHANGE COVER RELATIVE TO A PROJECT INVOLVING EXPLOITATION OF NATURAL RESOURCES UNLESS IT CONFORMS WITH THE POLICY STATEMENTS UNDER THIS DIRECTIVE.

NO CONTRACT COVERING THE SALE AND EXPORT OF THE PRODUCTS OF ENTERPRISES GRANTED A LICENSE OR CONCESSION FOR THE EXPLOITATION AND

DEVELOPMENT OF NATURAL RESOURCES SHALL BE APPROVED BY THE CENTRAL BANK UNLESS IT CONFORMS WITH THESE OPERATING GUIDELINES AND THE RULES AND REGULATIONS OF THE CENTRAL BANK GOVERING EXPORTS.

5) NEDA

FOR PURPOSES OF POLICY COORDINATION, THE NEDA SHALL NOT CLEAR ANY PROJECT OR PROGRAM, WHETHER OOF THE GOVERNMENT OR OF THE PRIVATE SECTOR INVOLVING EXPLOITATION OF NATURAL RESOURCES UNLESS IT CONFORMS WITH THE POLICY STATEMENTS UNDER THIS DIRECTIVE.

VI. CONSLTATIVE BODY

TO ENSURE A UNIFORM AND COORDINATE IMPLEMENTATION OF THE HEREIN OPERATING GUIDELINES, A CONSULTATIVE BODY REPRESENTING THE VARIOUS IMPLEMENTING AGENCIES IS HEREBY AUTHORIZED TO BE ORGANIZED WITH A PERMANENT SECRETARIES IN THE OFFICE OF THE SECRETARY OF NATURAL RESOURCES. UNQUOTE
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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: LAW, TEXT, INSTRUCTIONS, POLICIES, EXPLOITATION (NATURAL RESOURCES), FOREIGN INVESTMENTS
Control Number: n/a
Copy: SINGLE
Draft Date: 25 OCT 1974
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: shawdg
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1974MANILA12761
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Film Number: D740309-0361
From: MANILA
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1974/newtext/t19741016/aaaaanle.tel
Line Count: 349
Locator: TEXT ON-LINE, ON MICROFILM
Office: ACTION EA
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 7
Previous Channel Indicators: n/a
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: n/a
Review Action: RELEASED, APPROVED
Review Authority: shawdg
Review Comment: n/a
Review Content Flags:
Review Date: 08 AUG 2002
Review Event:
Review Exemptions: n/a
Review History: RELEASED <08-Aug-2002 by shawdg>; APPROVED <06 MAR 2003 by shawdg>
Review Markings:

Declassified/Released
US Department of State
EO Systematic Review
30 JUN 2005

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: PROPOSED PHILIPPINE REGULATIONS FOR FOREIGN INVESTMENT IN NATURAL RESOURCE EXPLOITATION
TAGS: EINV, RP
To: STATE
Type: TE
Markings: Declassified/Released US Department of State EO Systematic Review 30 JUN 2005